

84-758 (1)

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

NO.

VINCENT CACI,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Suite 600
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Tel. No. (716) 856-4022

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THE UNITED STATES OF AMERICA
DISTRICT COURT OF THE DISTRICT OF COLUMBIA

IN RE: [Name]
[Address]

[Name]
[Address]

[Name]
[Address]

[Name]
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[Name]
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QUESTIONS PRESENTED FOR REVIEW

Where an offense is punishable as both a felony and a misdemeanor, is the government obligated to instruct the Grand Jury on both charges?

The Court below answered in the negative.

Is 18 U.S.C. Section 1001 pre-empted by 31 U.S.C. Sections 5316 and 5322.

The Court below answered in the negative.

THE HISTORY OF THE UNITED STATES

OF THE UNITED STATES OF AMERICA
FROM THE FIRST SETTLEMENTS
TO THE PRESENT TIME
BY
JAMES M. SMITH
OF THE
UNITED STATES ARMY
AND
OF THE
UNITED STATES SENATE
IN TWO VOLUMES
VOL. I.
NEW YORK
PUBLISHED BY
J. B. LIPPINCOTT & CO.
1854

PARTIES

The petitioner is Vincent Caci.

The respondent is the United States of
America.



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PETITION FOR A WRIT OF CERTIORARI
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FOR THE SECOND CIRCUIT

Petitioner, VINCENT CACI, seeks a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on September 10, 1984.

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OPINION BELOW

The United States Court of Appeals for the Second Circuit issued a written opinion which is annexed hereto as Exhibit "A". This opinion has not yet been published.

JURISDICTION

VINCENT CACI was found guilty in the United States District Court for the Western District of New York, by a jury, of the offense of making false statements and concealing a material fact in a matter within the jurisdiction of the U.S. Customs Service in violation of 18 U.S.C. Section 1001 on February 9, 1984. On April 16, 1984, United States District Judge Charles L. Brieant, of the Southern District of New York, sitting by designation, entered judgment and imposed

CHAPTER I

The first part of the book is devoted to a general survey of the history of the United States from the discovery of the continent to the present time. It is a history of the growth of the nation, of the development of its institutions, and of the progress of its civilization.

CHAPTER II

The second part of the book is devoted to a detailed account of the political and social conditions of the United States at the time of the Revolution. It is a history of the struggle for independence, of the formation of the Constitution, and of the establishment of the federal government. It is a history of the growth of the nation, of the development of its institutions, and of the progress of its civilization.

The third part of the book is devoted to a detailed account of the political and social conditions of the United States at the time of the Civil War. It is a history of the struggle for freedom, of the formation of the Union, and of the establishment of the federal government. It is a history of the growth of the nation, of the development of its institutions, and of the progress of its civilization.

sentence.

On September 10, 1984, the United States Court of Appeals for the Second Circuit affirmed the judgment of conviction. On October 9, 1984, the United States Court of Appeals for the Second Circuit denied Petitioner's motion for an enlargement of time to file a Petition for a Rehearing in Banc.

This Petition is seasonably filed within sixty days of the affirmance by the United States Court of Appeals for the Second Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime,

The Defendant, in 1944, was indicted
by the Grand Jury of the District of Columbia
for the crime of conspiracy to defraud the
United States Government of money. The
Defendant, under the indictment, was
found guilty of conspiracy to defraud the
United States Government of money.

This conviction is a permanent bar
to the Defendant's employment in the
United States Government. The Defendant
is hereby ordered to pay a fine of \$10,000
and to serve a term of imprisonment of 10 years.

CONSTITUTIONAL PROVISIONS INVOLVED
ARTICLE I, SECTION 9, CLAUSE 2

The person shall be held to answer for
a capital or otherwise infamous crime,

unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State

Article 1. The purpose of this Convention is to secure the most complete and effective cooperation between the States of the Western Hemisphere in the maintenance of peace and the promotion of the welfare of the peoples of the Hemisphere. The States of the Hemisphere are hereby committed to the maintenance of peace and the promotion of the welfare of the peoples of the Hemisphere, and to the maintenance of the highest standards of justice and the promotion of the highest standards of civilization. The States of the Hemisphere are hereby committed to the maintenance of the highest standards of justice and the promotion of the highest standards of civilization. The States of the Hemisphere are hereby committed to the maintenance of the highest standards of justice and the promotion of the highest standards of civilization.

ARTICLE II

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State

shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. Section 1001

STATEMENTS OR ENTRIES GENERALLY

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false, fictitious or

fraudulent statement or entry, shall be fined not more than \$10,000.00 or imprisoned not more than five years, or both.

31 U.S.C. Section 5316

REPORTS ON EXPORTING AND
IMPORTING MONETARY INSTRUMENTS

a) Except as provided in subsection (c) of this section, a person or an agent or bailee of the person shall file a report under subsection (b) of this action when the person, agent, or bailee knowingly -

(1) transports or has transported monetary instruments of more than \$5,000.00 at one time -

(A) from a place in the United States to or through a place outside the United States; or

(B) to a place in the

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BUREAU OF PLANT INDUSTRY

FROM
THE
DIRECTOR OF THE
BUREAU OF ENTOMOLOGY
WASHINGTON, D.C.

RE: [Illegible]

[Illegible]

Very respectfully,
[Illegible]

United States from or through a place outside the United States.

31 U.S.C. Section 5322(a)
CRIMINAL PENALTIES

a) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315) shall be fined not more than \$1,000.00, imprisoned for not more than one year, or both.

STATEMENT OF THE CASE

A. Statement of Procedure

At pretrial proceedings, the defendant, by motion dated December 6, 1983, moved for a dismissal of the indictment based on the government's failure to instruct the Grand Jury on 31 U.S.C. Section 5316 and, in that same

Letter to the Hon. the Secretary of State
dated 10th July 1892

I have the honor to acknowledge the receipt of your letter of the 2nd inst. in relation to the proposed extension of the term of office of the members of the Board of Directors of the United States National Academy of Sciences. I am sorry to hear that the Board of Directors has decided to extend the term of office of its members for a period of five years. I am sure that the Board of Directors has acted wisely and in the best interests of the Academy.

REPLY TO THE BOARD

I am sorry to hear that the Board of Directors has decided to extend the term of office of its members for a period of five years. I am sure that the Board of Directors has acted wisely and in the best interests of the Academy. I am sure that the Board of Directors has acted wisely and in the best interests of the Academy.

motion, moved to dismiss the indictment on the ground that 31 U.S.C. Sections 5316 and 5322 pre-empted 18 U.S.C. Section 1001. The trial Court, by order dated January 12, 1984, denied both motions and in the appeal which ensued, the United States Court of Appeals for the Second Circuit affirmed.

B. Statement of Facts

On October 7, 1983, the petitioner entered the United States from Canada, via the Peace Bridge, located at Buffalo, New York. While at the Peace Bridge, the defendant was referred to a secondary inspection area. The government's evidence tended to show that the petitioner, while at the secondary inspection area, denied that he was in possession of in excess of \$5,000.00 in monetary instruments. A search of the

petitioner revealed that he had the sum of \$26,660.00 on his person. The petitioner was arrested and indicted for a violation of 18 U.S.C. Section 1001 and ultimately convicted of that charge.

REASONS FOR GRANTING THE WRIT

A false statement regarding the possession of more than \$5,000.00 in monetary instruments could not constitute an offense under 18 U.S.C. Section 1001 without the existence of 31 U.S.C. Section 5316. Congress, in enacting the requirement that a report be made, also set forth a specific penalty for failure to do so. 31 U.S.C. Section 5322. Failure to report more than \$5,000.00 in monetary instruments constitutes both a felony and misdemeanor. The government conceded in the trial Court that it

instructed the Grand Jury only with respect to 18 U.S.C. Section 1001 and gave no Grand Jury instructions on 18 U.S.C. 5316 and 5322. In holding that a prosecutor can present to the Grand Jury an act punishable as a felony and ignore the fact that the act is punishable as a misdemeanor gives that prosecutor unfettered discretion. Permitting the prosecutor to control whether a particular act would be punished as a misdemeanor or a felony raises serious constitutional questions of due process and equal protection. Berra v. United States, 351 U.S. 131, at page 139-140. There is no doubt that the selectivity in the enforcement of the criminal law is subject to constitutional restraints of equal protection and due process. The

government in this case, by giving no reason or justification whatsoever for presenting the felony and not the misdemeanor to the Grand Jury, nor giving instructions to the Grand Jury in this regard, has sub silentio, created an arbitrary classification in currency-border cases. To elect not to prosecute this case under 31 U.S.C. 5316 and 5322, the government has created a class of citizens that will be prosecuted more vigorously, those who fail to declare money in excess of \$5,000.00 when entering the United States. This is not a proper consideration by the government and creates an arbitrary classification in violation of due process and equal protection.

By reason of the foregoing, the government, in the Western District of New

York, has rendered meaningless 31 U.S.C. 5315 and 5322 in that the government has elected to prosecute these cases as felonies rather than misdemeanors.

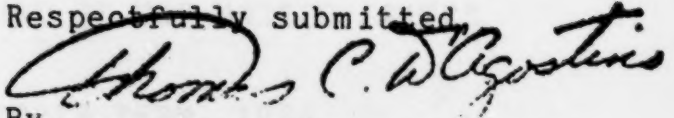
To continue to permit the Second Circuit and the Western District of New York to arbitrarily decide how to prosecute currency-border cases would preempt the authority of Congress. As the Court of last resort, the time has come to implement Rule 17.1(C) of the Supreme Court Rules and allow review of this most urgent question.

CONCLUSION

For all these reasons, the Court should grant this petition for certiorari.

DATED: November 6, 1984
Buffalo, New York

Respectfully submitted,



By

Thomas C. D'Agostino

MATTAR, D'AGOSTINO, KOGLER
& RUNFOLA

Attorneys for Petitioner

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Buffalo, New York 14202

716-856-4022

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IN THE
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OCTOBER TERM, 1984

NO.

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of September, one thousand nine hundred and eighty-four.

PRESENT:

HONORABLE WILFRED FEINBERG,
Chief Judge

HONORABLE THOMAS J. MESKILL,
HONORABLE JON O. NEWMAN,
Circuit Judges.

-----X

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

84-1148

VINCENT CACI,

Defendant-Appellant.

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Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said district court is AFFIRMED.

1. Appellant argues that because his act was punishable as both a felony and a misdemeanor the government was obliged to bring both charges before the Grand Jury. We disagree. It is well settled that when an act violates more than one statute, what, if any, charge to bring rests in the prosecutor's discretion. See United States v.

Batchelder, 442 U.S. 114, 123-24; United States v. Pick, 724 F.2d 297, 301 (2d Cir. 1983).

2. Appellant argues that the government failed to offer any proof of agency jurisdiction, that such jurisdiction is an essential element of a violation of 18 U.S.C. Section 1001, and that therefore the district court was wrong to take judicial notice of agency jurisdiction and to so instruct the jury. Agency jurisdiction under Section under 1001 is a question of law for the court, see United States v. Diaz, 690 f.2d 1352, 1357 (11th Cir. 1982), and the Customs Service's question about the money was plainly within its jurisdiction, see United States v. Grotke, 702 F.2d 49, 53 (2d Cir. 1983). The district court appropriately took judicial notice of agency jurisdiction.

3. Appellant argues that the district court erred in not instructing the jury on materiality. We disagree. Materiality is not an element of the offense of making a false statement in violation of 18 U.S.C. Section 1001. See *United States v. Elkin*, 731 F.2d 1005, 1009 (2d Cir. 1984).

4. Appellant's claim that 18 U.S.C. Section 1001 is preempted by 31 U.S.C. Sections 5316, 5322 is also without merit. In *Grotke*, *supra*, 702 F.2d at 54, this Court rejected the argument that the predecessors to sections 5316 and 5322 preempted 18 U.S.C. Section 1001. The subsequent congressional amendments did not affect this holding. See H.R. Rep. No. 651, 97th Cong., 2d Sess. 301, Table 2A, reprinted in 1982 U.S. Code Cong. & Ad. News 1895, 2195.

5. We have considered all of

appellant's contentions and they are without merit.

WILFRED FEINBERG, Chief Judge

THOMAS J. MESKILL,

JON O. NEWMAN,
Circuit Judges.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

DATE: Buffalo, New York
November 8, 1964

appealants' contentions and this was

affirmed.

WILLIAM F. BISHOP, Chief Judge.

THOMAS A. BISHOP,

JOS. G. BISHOP,
Circuit Judges.

It is now the duty of the court to consider the merits of the appeal. The court is of the opinion that the appeal is without merit and is hereby affirmed. The court is of the opinion that the appeal is without merit and is hereby affirmed. The court is of the opinion that the appeal is without merit and is hereby affirmed.

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 1984, within sixty days from September 10, 1984, the date of the Judgment of the United States Court of Appeals for the Second Circuit, I deposited 40 legible copies of Petitioner's Petition for Certiorari at the general post office, Buffalo, New York, with sufficient first class postage prepaid, directed to Clerk of the Court, Supreme Court of the United States, Washington, D.C. 20543 and 3 copies directed to Salvatore R. Martoche, United States Attorney, Western District of New York, Attention Joseph M. Guerra, III, A.U.S.A., United States Courthouse, Buffalo, New York 14202. I declare all of the above under the penalties of perjury.

DATED: Buffalo, New York
November 8, 1984

Thomas C. D'Agostino

Thomas C. D'Agostino, Esq.
Member of the Bar of the Supreme Court
of the United States of America
Attorney for Petitioner
MATTAR, D'AGOSTINO, KOGLER & RUNFOLA
Attorneys for Petitioner
17 Court Street
Buffalo, New York 14202

RE: VINCENT CACI, Petitioner, vs. UNITED
STATES OF AMERICA,